STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 22, 2008
v HAROLD TROY PRIDDY, Defendant-Appellant.	No. 276125 Ogemaw Circuit Court LC No. 06-002641-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v HAROLD TROY PRIDDY, Defendant-Appellant.	No. 276397 Ogemaw Circuit Court LC No. 06-002851-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v NANCY LYNN BRADSHAW-LOVE, Defendant-Appellant.	No. 276399 Ogemaw Circuit Court LC No. 06-002642-FC

Before: Markey, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendants were convicted following a joint trial before a single jury. Defendant Harold Priddy was convicted of conspiracy to aid the escape of a prisoner, MCL 750.157a and MCL

750.183, and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant Nancy Bradshaw-Love was convicted of conspiracy to commit assault with intent to do great bodily harm less than murder, MCL 750.157a, and escape while awaiting trial for a felony, MCL 750.197(2). Defendant Priddy was sentenced to concurrent prison terms of 47 to 84 months for the conspiracy conviction and 67 to 120 months for the assault conviction. Defendant Bradshaw-Love was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 12 to 30 years for the conspiracy conviction and 10 to 15 years for the escape conviction. Defendant Priddy appeals his conspiracy conviction by right in Docket No. 276125, and his assault conviction by right in Docket No. 276397. Defendant Bradshaw-Love appeals by right in Docket No. 276399. We affirm defendant Priddy's convictions but remand for correction of his presentence report. We affirm defendant Bradshaw-Love's convictions and sentences, but vacate the trial court's order requiring her to reimburse the county for attorney fees and remand for reconsideration so that the trial court may assess her ability to pay.

Defendants' convictions arise from an incident at the Ogemaw County Courthouse. While a corrections officer was transporting defendant Bradshaw-Love to the courthouse for a preliminary examination on unrelated criminal charges, defendant Priddy attempted to assist Bradshaw-Love escape by throwing gasoline on the officer in the courthouse stairwell and threatening to burn him.

I. Defendant Priddy's Appeals in Docket Nos. 276125 and 276397

A. Assault with Intent to Do Great Bodily Harm – Sufficiency of the Evidence

Defendant Priddy argues that there was insufficient evidence to prove that he assaulted the corrections officer with intent to do great bodily harm. We disagree.

In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do serious injury of an aggravated nature. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005).

The jury could find from the evidence that Priddy attacked the corrections officer in a stairwell by throwing gasoline in his face, grabbing the officer, and threatening to set him on fire. Further, there was evidence Priddy then dumped more gasoline down the back of the officer's head and attempted to tie the officer's hands behind his back. The officer managed to break free and fought with Priddy until other others arrived and apprehended him. A lighter was found on Priddy's person at the time of his arrest.

Priddy's dousing the officer with gasoline and threatening to burn him coupled with his possession of the means by which to carry out his threat, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to infer beyond a reasonable doubt that Priddy assaulted the officer with an intent to inflict serious injury of an aggravated nature. Thus, the evidence was sufficient to support Priddy's assault conviction.

B. Conspiracy Conviction

Defendant was charged with conspiracy to aid the escape of a prisoner contrary to MCL 750.157a and MCL 750.183. The latter statute prohibits the substantive offense and provides pertinent to this case:

> Any person who . . . shall by any means whatever, aid or assist any prisoner in his or her endeavor to escape [from any jail, prison, or other like place of confinement], whether such escape be effected or attempted, or not, . . . is guilty of a felony . . . . [MCL 750.183.]

A conspiracy exists when two or more persons combine with the intent to accomplish an illegal objective. *People v Martin*, 271 Mich App 280, 317; 721 NW2d 815 (2006). It is not necessary to offer direct proof of the conspiracy. *Id*. Instead, it is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact. *Id*. Circumstantial evidence and inferences arising from the evidence may be used to establish the existence of the conspiracy. *Id.*

Here, the prosecution presented letters from Bradshaw-Love to Priddy. Although many of the letters are confusing and unclear, in one, Bradshaw-Love informed Priddy of the day, time, and place of her preliminary examination. That letter states that she would use thumb signs to communicate with him, discussed slipping off her handcuffs, and told him to dress to "blend in." In another letter, Bradshaw-Love stated, "It is risky but I am feeling too old for this. The only other option I see is to do the time fighting day by day for my freedom legally and that is a minimum of five and a half years." Another letter states, "No need for death, at the most a stunning blow; quick & less noise better." Yet another letter indicated that Bradshaw-Love had surveilled the stairway where the attack occurred. Priddy parked in the location that Bradshaw-Love had directed in another letter. These letters, as well as a handwritten map of the courthouse, jail, and parking lot, were found in Priddy's vehicle, which he drove to the courthouse.

There was also evidence of telephone conversations between Priddy and Bradshaw-Love that suggested an agreement for Priddy to help her escape. In one conversation, Priddy made comments such as "I have been working hard. You know what I am talking about. I have been working hard getting that thing taken care of" and "I got your back. It is just a few days," and "It is going to happen. You know what I mean."

This evidence, together with the evidence of the attack on the corrections officer, viewed most favorably to the prosecution, was sufficient to support a finding that both defendants conspired to have Priddy help Bradshaw-Love escape from jail.

Nevertheless, Priddy argues that his conspiracy conviction should be reversed because it violates the common-law one-man conspiracy rule. That rule provides that "'if two are tried together for a conspiracy in which no additional persons are implicated, a verdict finding one guilty and the other not guilty requires a judgment of acquittal of both.'" *People v Anderson*, 418 Mich 31, 36; 340 NW2d 634 (1983) (citation omitted). The *Anderson* Court explained the

rationale of the rule is to prevent the enforcement of inconsistent verdicts that might result when two or more alleged conspirators are jointly tried. *Id.*

In this case, there was no violation of one-man conspiracy rule because Priddy and Bradshaw-Love were not jointly tried with regard to the same conspiracy. Indeed, Bradshaw-Love was not even charged with conspiracy to aid the escape of a prisoner. Rather, she was charged and convicted of conspiracy to assault the corrections officer. So, because Priddy and Bradshaw-Love were not jointly tried on the same conspiracy charge, the one-man conspiracy rule simply does not apply. *Id.* at 37-38.

Priddy next contends that Wharton's Rule requires the reversal of his conspiracy conviction. That rule bars conviction for conspiracy to commit an offense that necessarily requires two persons' participation to commit. In *People v Carter*, 415 Mich 558, 570-573; 330 NW2d 314 (1982), overruled in part on other grounds in *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984), the Supreme Court explained Wharton's Rule as follows:

> One of the major exceptions to the general principle that conspiracy and its target offense are separately punishable is known as Wharton's Rule. This rule, which operates as a substantive limitation upon the scope of the crime of conspiracy, states that an agreement by two persons to commit a substantive crime cannot be prosecuted as a conspiracy where the crime itself necessarily requires the participation and cooperation of two persons. Thus, where concerted activity and a plurality of agents are essential elements of a substantive offense, Wharton's Rule bars a prosecution for conspiracy to commit that crime.
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> The classic Wharton's Rule offenses—adultry, bigamy, dueling, and incest—are those crimes where "the conspiracy to commit them is in such close connection with the objective offense[s] as to be inseparable from them." Additionally, the crimes are such that "[t]he parties to the agreement are the only persons who participate in [the] commission of the substantive offense, and the immediate consequences of the crime rest on the parties themselves rather than on society at large."
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> In practice, Wharton's Rule generally operates as a judicial presumption to proscribe a conspiracy charge in the absence of legislative intent to the contrary. The applicability of the rule depends on the nature of the target offense that constitutes the object of the conspiracy. Specifically, the focus is upon the elements of the crime rather than upon the factual circumstances of the particular case. Thus, the test is satisfied when, by definition, the object crime necessarily requires the participation of two people. If the offense could logically be accomplished by a single individual, Wharton's Rule does not apply. The fact that in a particular case cooperation between the offenders was a practical necessity, *i.e.*, the crime could not have been committed without concerted action

> or would have been made much more difficult without it, is not sufficient to invoke the rule. [*Carter*, *supra* at 570-573 (citations omitted).]

The plain language of MCL 750.183 provides that the prisoner's escape or attempt to escape is not necessary to sustain a conviction of violating its terms. Even though that part of the statute defendant was charged with conspiring to commit requires that a prisoner "endeavor to escape" from a jail or other place of confinement, one person may violate the statute by providing aid or assistance of that endeavor. Whoever provides the aid for the escape endeavor commits the offense of aiding an escape prohibited by MCL 750.183, not the person endeavoring to escape. Other statutes punish a prisoner's escape or attempt to escape from confinement. See MCL 750.193, MCL 750.195, MCL 750.196, MCL 750.197, and MCL 750.197a. The object of the conspiracy at issue, Bradshaw-Love, was convicted of escape while awaiting trial for a felony, MCL 750.197(2). Because a single person acting alone can violate MCL 750.183, Wharton's Rule is inapplicable.

Priddy next argues that the trial court erred in admitting Bradshaw-Love's statements because the prosecutor did not present independent proof of a conspiracy. Priddy also claims he was denied a fair trial, due process, and violation of his right of confrontation because he had no opportunity to cross-examine Bradshaw-Love. We disagree.

We review trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005). This standard anticipates that there will be circumstances in which there may be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). When the trial court selects one of these principled outcomes, it has not abused its discretion. *Id*.

MRE 801(d)(2)(E) provides that a statement is not hearsay if the statement is offered against a party and is a statement "by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." To be admitted under this rule, the proponent of the evidence must establish by a preponderance of the evidence that a conspiracy existed through independent evidence. *Martin, supra* at 317. Circumstantial evidence and inferences arising from the evidence may be used to establish the existence of the conspiracy. *Id*.

In this case, there was independent proof of a conspiracy sufficient to allow admission of Bradshaw-Love's statements against Priddy under MRE 801(d)(2)(E). In particular, the two defendants were in a relationship, Priddy hid in the stairwell while the corrections officer was transporting Bradshaw-Love from the jail, and Bradshaw-Love stopped at a water faucet immediately before the attack, suggesting she was buying time for Priddy to prepare for the attack. Additionally, Bradshaw-Love subsequently attempted to conceal the stairwell attack. This was sufficient circumstantial evidence of the escape conspiracy to admit Bradshaw-Love's statements against Priddy under MRE 801(d)(2)(e).

We also conclude Priddy's confrontation rights were not violated by the admission of Bradshaw-Love's statements. A defendant has the right to confront the witnesses against him. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant is unavailable at trial and the defendant had a prior opportunity for cross-examination. *Crawford v*

Washington, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Jambor (On Remand)*, 273 Mich App 477, 486; 729 NW2d 569 (2007). But the Confrontation Clause is not implicated unless the out-of-court statements are testimonial. *Crawford*, *supra* at 68; *Davis v Washington*, 547 US 813, 821; 126 S Ct 2266, 2273; 165 L Ed 2d 224 (2006). This is because only testimonial statements cause the declarant to be a "witness" within the meaning of the Confrontation Clause. *Davis*, *supra* at 821. It is the testimonial character of a statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause. *Id*.

"Testimonial" statements include prior trial testimony, pretrial statements that the declarant could reasonably expect to be used in a prosecutorial manner, and statements made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. *Crawford*, *supra* at 51-52; *Jambor*, *supra* at 487. Here, Bradshaw-Love's statements in letters to, and phone conversations with Priddy were not testimonial because she could not reasonably expect them to be used in a future prosecution and they were not made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. See *People v Bauder*, 269 Mich App 174, 180-182; 712 NW2d 506 (2005) (remarks to friends, coworkers, and the defendant's relatives not testimonial). Accordingly, Priddy's constitutional claim fails.

C. Sentencing Issues

Priddy argues that resentencing is required because the trial court erroneously scored offense variables 3, 7, 9, and 19. Although the trial court's factual findings at sentencing are reviewed for clear error, *Babcock*, *supra* at 264-265, the trial court's scoring of the sentencing guidelines will be upheld if there is any evidence in the record to support it, *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

The trial court scored 25 points for OV 3, which is appropriate where a "life threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). Conversely, a ten-point score is appropriate where the victim suffers a bodily injury requiring medical treatment. MCL 777.33(1)(d). Although Priddy and the prosecutor both believed that a ten-point score was appropriate for OV 3, the trial court stated that it was scoring 25 points because it is life threatening for someone with a lighter to throw gasoline on someone else. Although we do not disagree that such conduct is life threatening, we conclude the trial court erred in scoring OV 3 on the basis of a threatened injury, rather than an injury actually sustained. It is appropriate only to score points under OV 3 for "physical injury to a victim," MCL 777.33(1), not for potential or threatened injury. Therefore, the trial court erred in scoring 25 points for OV 3. Instead, only ten points should have been scored because it was undisputed that the victim obtained medical treatment because the gasoline splashed into his eyes. MCL 777.33(1)(d).

The trial court scored 50 points for OV 7, which is appropriate if "a victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). The evidence indicated that Priddy poured gasoline on the officer and threatened to set him on fire. Priddy then poured more gasoline on the officer's head, chased him down, and attempted to tie him up. Because this evidence thoroughly supports the trial court's finding that Priddy engaged in conduct designed to

substantially increase the fear and anxiety the victim suffered during the offense, the trial court did not err in scoring 50 points for OV 7.

The trial court scored ten points for OV 9, which is appropriate when two or more persons are placed in danger of physical injury during an offense. MCL 777.39(1)(c) and (2)(a); *People v Melton*, 271 Mich App 590, 592; 722 NW2d 698 (2006). Although the corrections officer was the target of Priddy's assault, at least two other persons entered the stairwell during the attack in an attempt to intervene. These persons were placed in danger of physical injury and, therefore, were victims for purposes of OV 9. Accordingly, the trial court properly scored OV 9 at ten points.

The trial court scored 25 points for OV 19, which is appropriate when an offender's conduct threatens the security of a penal institution or court. MCL 777.49(a). In this case, Priddy threw gasoline, a highly ignitable and combustible substance, in the stairwell of the courthouse, and threatened to ignite the gasoline. Even though the attack occurred in a stairwell, the security of the court was also threatened. So, 25 points were properly scored for OV 19.

In sum, Priddy has not established a scoring error apart from the scoring of OV 3. The scoring of the guidelines for Priddy's assault conviction resulted in Priddy receiving 155 total offense variable points, which, combined with his 30-point prior record variable score, placed him in the D-VI cell for a class D offense, resulting in a minimum sentence range of 34 to 67 months. MCL 777.65. The 15-point reduction for OV 3 will reduce Priddy's total offense variable points to 140, which is still well in excess of the 75 points needed to place Priddy in offense variable level VI, the highest level possible. Accordingly, the scoring error does not affect the appropriate guidelines range. Therefore, resentencing is not required. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). However, the trial court shall correct the scoring on remand.

Priddy also argues that resentencing is required because the presentence report included information indicating that he had threatened to kill the judge and the prosecutor. Priddy denied making the alleged threat. The trial court resolved Priddy's challenge to the accuracy of this information by indicating that it would not consider the disputed information at sentencing.

A party may challenge the accuracy or relevancy of any information contained in a presentence report. MCL 771.14(6); MCR 6.425(E)(1)(b). If any information is challenged, the trial court must allow the parties to be heard and make a finding regarding the challenge, or determine that a finding is unnecessary because the court will not consider the information during sentencing. MCR 6.425(E)(2). When a court disregards information challenged as inaccurate, it must strike the information from the presentence report. *People v Spanke*, 254 Mich App 642, 649-650; 658 NW2d 504 (2003).

Because the trial court decided to disregard the disputed information, it was required to strike the information from Priddy's presentence report. Therefore, the appropriate remedy here is not resentencing, but rather remand so that the disregarded information can be stricken from Priddy's presentence report. Accordingly, we remand for that purpose.

II. Defendant Bradshaw-Love's Appeal in Docket No. 276399

A. Jury Instructions

Defendant Bradshaw-Love argues that she is entitled to a new trial because the trial court's conspiracy instructions were deficient.

Because Bradshaw-Love did not object at trial to the trial court's jury instructions, this issue is not preserved. We review this issue for plain error affecting Bradshaw-love's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We must examine jury instructions in their entirety to determine whether any error requires reversal. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). This Court will not reverse if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id*.

The trial court's instructions informed the jury that it was required to find that Bradshaw-Love agreed with someone else to commit the crime of assault with intent to do great bodily harm. An unlawful agreement between two or more persons is the gist of the crime of conspiracy. *People v Blume*, 443 Mich 476; 505 NW2d 843 (1993). Considered as a whole, the trial court's instructions fairly presented the issues to be tried and sufficiently protected Bradshaw-Love's substantial rights.

B. Ineffective Assistance of Counsel

Bradshaw-Love raises several claims of ineffective assistance of counsel, none of which have merit.

Because Bradshaw-Love did not raise this issue in a motion for a new trial or otherwise create a testimonial record in the trial court, our review is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To justify reversal under either the federal or state constitution, a convicted defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, the defendant must show that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 600. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Bradshaw-Love first argues that trial counsel was ineffective for failing to pursue an insanity defense. A criminal defendant is denied the effective assistance of counsel when her attorney fails to investigate and present a meritorious insanity defense. *People v Parker*, 133 Mich App 358, 363; 349 NW2d 514(1984). Insanity is an affirmative defense requiring proof that, as a result of mental illness or being mentally retarded, the defendant lacked substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law. *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001).

In support of her argument, Bradshaw-Love relies solely on an unsigned, unsworn affidavit that indicates that she has a history of bipolar disorder and depression. However, the affidavit does not include any facts indicating that Bradshaw-Love was legally insane when she committed the charged offenses, and nothing in the record supports Bradshaw-Love's claim that she had a meritorious insanity defense. Therefore, Bradshaw has failed to show that defense counsel was ineffective for failing to pursue an insanity defense, or that remand to make a testimonial record is necessary.

Bradshaw-Love also argues that defense counsel was ineffective for failing to object to the trial court's jury instructions on the conspiracy charge, but because those instructions were sufficient to protect Bradshaw-Love's substantial rights, Bradshaw-Love was not prejudiced by counsel's failure to object.

Bradshaw-Love lastly argues that defense counsel was ineffective for failing to move for a change of venue, given that the charged offenses took place in the same courthouse as the trial, thereby enabling the jurors to view the crime scene.

It is improper for a jury to consider extraneous facts not introduced in evidence. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). But nothing in the record indicates that the jurors actually viewed the crime scene. Even if some jurors may have viewed the location where the crimes were committed, there is no basis for concluding that any jurors were exposed to anything that was not a matter of evidence. Therefore, Bradshaw-Love has not established that she was prejudiced and her ineffective assistance of counsel claim necessarily fails.

C. Sentencing Issues

Bradshaw-Love's reliance on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), to argue that the trial court improperly engaged in judicial fact-finding when scoring the sentencing guidelines is misplaced. Our Supreme Court has repeatedly held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 148, 155, 160; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Additionally, because there was no *Blakely* violation, defense counsel was not ineffective for failing to object on this basis. Counsel is not required to make a meritless objection. *Cox*, *supra* at 453.

Finally, Bradshaw-Love argues that the trial court erred when it required her to pay the county $500 as reimbursement for attorney fees without considering her ability to pay. Although the trial court was authorized to order Bradshaw-Love to reimburse the county for the cost of her court-appointed attorney, it was required to consider her ability to pay now and in the future. *People v DeJesus*, 477 Mich 996-997; 725 NW2d 669 (2007); *People v Dunbar*, 264 Mich App 240, 254; 690 NW2d476 (2004). The trial court in ordering Bradshaw-Love to reimburse the county $500 for her attorney did not indicate that it considered her financial circumstances. Accordingly, we vacate the order of reimbursement and remand this matter to the trial court for reconsideration consistent with *Dunbar*.

In Docket No. 276125 and Docket No. 276397, we affirm defendant Priddy's convictions and sentences but remand for correction of the guidelines score and the presentence report. In Docket No. 276399, we affirm defendant Bradshaw-Love's convictions and sentences, but

vacate the trial court's order requiring her to reimburse the county for attorney fees and remand for reconsideration of that issue consistent with *Dunbar*. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder